

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Denial of the
License of Lois DuFault to Provide
Adult Foster Care under Minn.
R. 9555.5105 to 9555.6265

**FINDINGS OF FACT, CONCLUSIONS
AND RECOMMENDATION**

The above matter came on for a contested case hearing before Administrative Law Judge M. Kevin Snell ("ALJ") at the Itasca Resource Center, 1209 SE Second Avenue, Grand Rapids, Minnesota on January 7, 2008. The hearing record closed at the end of the hearing on January 7, 2008.

Ms. Marian Barcus, Division Manager of Itasca County Health & Human Services, 1209 SE Second Avenue, Grand Rapids, Minnesota 55744, represented the Department of Human Services (the Department) at the hearing. The Applicant, Lois Elaine DuFault, 36884 Pincherry Road, Cohasset, Minnesota 55721, represented herself at the hearing.

STATEMENT OF THE ISSUE

Was Lois DuFault properly denied an adult foster care license because of a disqualification?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Ms. Lois Elaine DuFault is a 66-year-old woman who first became a certified nursing assistant in 1981 and most recently was recertified on June 22, 2007.^[1]

2. In March of 2007, Ms. DuFault applied for an adult foster care license so that she could provide respite care to elderly adults in their homes, by completing the required documentation, including an authorization for a background study.^[2]

3. The background study revealed the following criminal record:

a. A May 24, 2005, conviction for driving after cancellation, a gross misdemeanor, resulting in a sentence of: a \$993.00 fine; 30 days of electric monitoring; and one year in jail that was stayed for two years;^[3] and

b. A November 25, 2002, conviction for one count of terroristic threats, a felony under Minn. Stat. § 609.713, arising from an incident on September 9, 2002, resulting in a sentence of: a stay of adjudication for five years; supervised probation; 30 days in jail with 90 days electronic monitoring; \$1,040.00 in fines; no contact with the victims, their families or their property; no bars; no alcohol; no drugs; subject to spot checks; and follow the recommendations of a chemical dependency evaluation.^[4]

4. The September 9, 2002, incident, involving alcohol, occurred after Ms. DuFault had a physical altercation with a female neighbor in the yard. Subsequent to a shouting match with the neighbor and the neighbor's male guest about Ms. DuFault's dog coming into the neighbor's yard during their barbecue, she cuffed the female neighbor on the ear and the neighbor threw Ms. DuFault to the ground and sat on her. Ms. DuFault was released and pushed into her yard by the neighbor. Ms. DuFault came back outside later with a BB gun she was using to chase "critters" from her garage and she threatened to shoot. The neighbor and five witnesses at the barbecue reported to the police that Ms. DuFault said she was going to shoot them. Ms. DuFault reported to police and the judge that she was yelling at a squirrel that had been in her garage.^[5] On November 25, 2002, Ms. DuFault, represented by legal counsel, pleaded guilty to the terroristic threats charge.^[6]

5. Ms. DuFault successfully completed the terms of the sentences imposed for both convictions and was discharged from probation.^[7] In addition, Ms. DuFault successfully completed 16 weeks of rehabilitation at Rapids Counseling.^[8] A five-year restraining order against Ms. DuFault in favor of the female neighbor and her family expired in November 2007.^[9] That same female neighbor is now married to Ms. DuFault's nephew.^[10]

6. On March 14, 2007, and May 14, 2007, the Itasca County Adult Foster Care licensor sent Ms. DuFault letters with various inaccuracies, stating that she was disqualified from receiving a license.^[11] A June 22, 2007 letter, with substantially correct information, was sent to Ms. DuFault that stated she was disqualified from receiving a license.^[12] Ms. DuFault requested reconsideration of the disqualification, which was received by the Department on June 27, 2007.^[13]

7. On August 15, 2007, Itasca County recommended to the Commissioner that Ms. DuFault's request for a license be denied because of the disqualification and that:

This letter is a recommendation of denial of license because as a respite provider, Ms. DuFault would not be under the supervision of others while working, she would be alone with the clients served.^[14]

8. As part of the licensing process, a Risk of Harm Determination Work Sheet was completed that concluded Ms. DuFault would pose an intermediate risk of harm to persons served in the program, primarily because she would have unsupervised contact as a respite provider.^[15]

9. On September 25, 2007, the Department issued a Notice of Disqualification – Not Set Aside and Order of Denial.^[16]

10. Beginning on May 20, 2007, and continuing to September 30, 2007, friends, co-workers and an employer sent Itasca County and the Department 14 letters of support and references as to her good character,^[17] most notably the Office Coordinator for Oakridge Homes, who stated:

. . . I also had occasion to work with her at the home with the clients. She also takes the time to explain what she is doing for them, such as when dressing the client or feeding them lunch. I thought she showed great patience also and never hurried the client. Her active treatment with the clients is excellent and she always puts their needs and comfort before her own.^[18]

11. Ms. DuFault exercised her right of appeal and on November 2, 2007, Mr. Jerry Kerber issued the Notice of and Order for Hearing to be held on January 7, 2008.^[19]

12. These Conclusions are reached for the reasons set forth in the Memorandum below, which is hereby incorporated by reference into these Conclusions.

13. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions, and as Findings any Conclusions that are more appropriately described as Findings.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services are authorized to consider appeal of the denial of an adult foster care license, pursuant to Minn. Stat. §§ 245A.05, 245A.08, 254C.28, and 14.50.

2. Ms. DuFault received due, proper and timely notice of the basis for the agency's decision, and of the time and place of the hearing. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant substantive and procedural legal requirements.

4. The applicant for a license has the burden of demonstrating by a preponderance of the evidence that she meets all the requirements for a license.^[20]

5. A background study must be conducted on every applicant for a license.^[21]

6. The commissioner shall disqualify an individual from becoming a license holder when a background study shows conviction of or admission to one or more crimes listed in Minn. Stat. § 245C.15, including Minn. Stat. § 609.713 (terroristic threats).^[22]

7. An individual is disqualified if less than 15 years have passed since the discharge of the sentence for a felony conviction under Minn. Stat. § 609.713.^[23] Based on her felony-level conviction for terroristic threats, Ms. DuFault is disqualified, under Minn. Stat. § 245C.14, from being granted a license.

8. Minn. Stat. § 245C.24, subd. 3, **DISQUALIFICATION; BAR TO SET ASIDE A DISQUALIFICATION; REQUEST FOR VARIANCE**, provides, in applicable part, as follows:

Ten-year bar to set aside disqualification. (a) The commissioner may not set aside the disqualification of an individual in connection with a license to provide family child care for children, foster care for children in the provider's home, or foster care or day care services for adults in the provider's home if: (1) less than ten years has passed since the discharge of the sentence imposed, if any, for the offense; or (2) when disqualified based on a preponderance of evidence determination under section 245C.14. subdivision 1, paragraph (a), clause (2), or an admission under section 245C.14. subdivision 1, paragraph (a), clause (1), and less than ten years has passed since the individual committed the act or admitted to committing the act, whichever is later; and (3) the individual has committed a violation of any of the following offenses: . . . 609.713 (terroristic threats) . . .

9. Minn. Stat. § 245C.30, subd. 1(a), provides:

Except for any disqualification under § 245C.15, subdivision 1, when the Commissioner has not set aside a background study subject's disqualification and there are conditions under which the disqualified

individual may provide direct contact services or have access to people receiving services that minimize the risk of harm to people receiving services, the commissioner may grant a time-limited variance to a license holder.

10. The Commissioner may not grant a variance to Ms. DuFault because she is not a license holder and is therefore ineligible for a variance.

11. Minn. R. 9555.6125 provides in applicable part:

Subp. 4. Qualifications. Operators, caregivers and household members must meet the qualification in items A to G.

...

D. Operators, caregivers and household members must not have a disqualification under Minnesota Statutes, section 245C.15, that is not set aside under Minnesota Statutes, section 245C.22 or for which a variance has not been granted under Minnesota Statutes, section 245C.30.

12. Ms. DuFault has not demonstrated by a preponderance of the evidence that she meets all requirements for a license.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends that:

The Commissioner's order denying the application of Lois DuFault for an adult foster care license be AFFIRMED.

Dated: January 29, 2008

s/M. Kevin Snell

M. Kevin Snell
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services (the Commissioner) will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this report to file Exceptions to the report. At the end of the exceptions period, the record will close. The Commissioner then has 10 working days to issue his final decision. Parties should contact Cal Ludeman, acting Commissioner of Human Services, Box 64998, St. Paul MN 55155, (651) 431-2907, to learn the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Ms. DuFault's application for a license to provide adult foster care was denied because of a disqualification arising from her conviction, on November 25, 2002, of the crime of terroristic threats, a felony under Minn. Stat. § 609.713. That conviction is the basis of a 15-year disqualification pursuant to Minn. Stat. § 245C.15, subd. 2. The law, Minn. Stat. § 245C.24, subd. 3, does not allow the Commissioner of Human Services any discretion to set aside Ms. DuFault's disqualification and grant her a license until ten (10) years have elapsed since November 25, 2002, the date of her guilty plea.^[24]

Nor is relief available to Ms. DuFault by way of variance. Minn. Stat. § 245C.30, which provides the situations under which variances may be granted for disqualified individuals, states, at subd. 1(a):

Except for any disqualification under § 245C.15, subdivision 1, when the Commissioner has not set aside a background study subject's disqualification and there are conditions under which the disqualified individual may provide direct contact services or have access to people receiving services that minimize the risk of harm to people receiving services, **the commissioner may grant a time-limited variance to a license holder.** [Emphasis added.]

Unfortunately for Ms. DuFault, since she is not a license holder, no possibility exists in this circumstance for the Commissioner to grant a variance first and then a license. However, this does not prevent a prospective employer that is an adult foster care license holder from requesting a variance for Ms. DuFault that would allow her to work as an employee for such an employer. The County expressed regret that it could not issue a license to Ms. DuFault, even though it determined that Ms. DuFault poses an intermediate risk of harm for adults because of the expressed concern that she would be unsupervised when caring for the elderly in their homes. This risk would become low with supervision, and other proper conditions. At this time, the only recommendation that can be made under the law that binds the Commissioner and the ALJ is that the Order of Denial of a license be affirmed.

M. K. S.

^[1] Testimony of Lois Elaine DuFault, Exhibits 9 and 21.

^[2] Test. of L. DuFault and Audra Olson, Adult Foster Care Licensors for Itasca County Health & Human Services, Ex. 8.

^[3] Ex. 9.

^[4] Exs. 10-17.

- ^[5] Exs. 11 & 17, test. of L. DuFault.
- ^[6] Ex. 17.
- ^[7] Test. of L. DuFault, Exs. 18 & 27.
- ^[8] Test. of L. DuFault.
- ^[9] *Id.*
- ^[10] *Id.*
- ^[11] Test. of A. Olson, Exs. 1-5.
- ^[12] Test. of A. Olson, Ex.6.
- ^[13] Test. of A. Olson and L. DuFault, Ex. 20.
- ^[14] Ex. 7, test. of A. Olson.
- ^[15] Ex. 19, test. of A. Olson.
- ^[16] Ex. 20.
- ^[17] Exs. 22- 26, and 28-34
- ^[18] Ex. 25.
- ^[19] Notice of and Order for Hearing.
- ^[20] Minn. Stat. § 245A.08, subd. 3.
- ^[21] Minn. Stat. § 245C.03, subd. 1.
- ^[22] Minn. Stat. § 245C.14, subd. 1(a)(1), (2).
- ^[23] Minn. Stat. § 245C.15, subd. 2(a).
- ^[24] "When a disqualification is based on an admission, the disqualification period begins from the date of an admission in court." Minn. Stat. § 245C.15, subd. 2. (f).